

**Letter of Findings Number: 04-20120246**  
**Sales and Use Tax**  
**For Tax Years 2009-10**

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**ISSUE**

**I. Sales and Use Tax—Imposition.**

**Authority:** IC § 6-2.5-2-1; IC § 6-2.5-3-2; IC § 6-2.5-8-8; IC § 6-8.1-5-1; [45 IAC 2.2-3-4](#); [45 IAC 2.2-5-4](#); [45 IAC 2.2-8-12](#).

Taxpayer protests the imposition of sales and use tax on certain items of tangible personal property.

**STATEMENT OF FACTS**

Taxpayer is an Indiana retail business. As the result of an audit, the Indiana Department of Revenue ("Department") determined that Taxpayer had not collected and remitted the proper amount of sales tax as a retail merchant and also had not remitted the proper amount of use tax as a consumer for the tax years 2009 and 2010. The Department therefore issued proposed assessments for sales and use tax plus interest for those years. Taxpayer disagreed with some of the items included as taxable in the audit calculations. An administrative hearing was held and this Letter of Findings results. Further facts will be supplied as required.

**I. Sales and Use Tax—Imposition.**

**DISCUSSION**

Taxpayer protests the imposition of sales and use tax on certain items. The Department based its determination to impose sales tax on some items because Taxpayer is a retail merchant and has a duty to collect and remit sales tax on items of tangible personal property ("TPP") it sells at retail. The Department based its determination to impose use tax on items which Taxpayer used as a consumer, but upon which it did not pay sales tax at the time of purchase. Taxpayer disagrees with some of the items listed as taxable in the Department's audit report. The Department notes that the burden of proving a proposed assessment wrong rests with the person against whom the proposed assessments are made, as required by IC § 6-8.1-5-1(c).

The sales tax is imposed by IC § 6-2.5-2-1, which states:

- (a) An excise tax, known as the state gross retail tax, is imposed on retail transactions made in Indiana.
  - (b) The person who acquires property in a retail transaction is liable for the tax on the transaction and, except as otherwise provided in this chapter, shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction. The retail merchant shall collect the tax as agent for the state.
- (Emphasis added).

The use tax is imposed under IC § 6-2.5-3-2(a), which states:

- (a) An excise tax, known as the use tax, is imposed on the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction, regardless of the location of that transaction or of the retail merchant making that transaction.

Also, [45 IAC 2.2-3-4](#) provides:

Tangible personal property, purchased in Indiana, or elsewhere in a retail transaction, and stored, used, or otherwise consumed in Indiana is subject to Indiana use tax for such property, unless the Indiana state gross retail tax has been collected at the point of purchase.

Therefore, when a retail merchant sells TPP, that retail merchant is required to collect the sales tax as agent for the state. Also, when TPP is acquired in a retail transaction and is stored, used, or consumed in Indiana, Indiana use tax is due if sales tax has not been paid at the point of purchase. In this case, the Department determined that Taxpayer had both sold TPP and had acquired TPP in a retail transaction and used that property in Indiana without paying sales tax at the point of purchase. The Department therefore issued proposed assessments for both sales tax as a retail merchant and use tax as a consumer.

Regarding the imposition of sales tax, Taxpayer protests that some of the sales upon which the Department considered sales tax to be due were actually exempt sales. In support of this position, Taxpayer provided several exemption certificates which it states that the audit did not consider. Pursuant to IC § 6-2.5-8-8:

- (a) A person, authorized under subsection (b), who makes a purchase in a transaction which is exempt from the state gross retail and use taxes, may issue an exemption certificate to the seller instead of paying the tax. The person shall issue the certificate on forms and in the manner prescribed by the department. A seller accepting a proper exemption certificate under this section has no duty to collect or remit the state gross retail or use tax on that purchase.
- (b) The following are the only persons authorized to issue exemption certificates:
  - (1) retail merchants, wholesalers, and manufacturers, who are registered with the department under this

chapter;

(2) organizations which are exempt from the state gross retail tax under [IC 6-2.5-5-21](#), [IC 6-2.5-5-25](#), or [IC 6-2.5-5-26](#) and which are registered with the department under this chapter; and

(3) other persons who are exempt from the state gross retail tax with respect to any part of their purchases. (c) The department may also allow a person to issue a blanket exemption certificate to cover exempt purchases over a stated period of time. The department may impose conditions on the use of the blanket exemption certificate and restrictions on the kind or category of purchases that are exempt. (Emphasis added).

In addition, [45 IAC 2.2-8-12](#) provides:

(a) Exemption certificates may be issued [sic.] only by purchasers authorized to issue such certificates by the Department of Revenue. Retail merchants, manufacturers, wholesalers and others who must register with the Department of Revenue and who qualify to purchase exempt from tax under this Act [\[IC 6-2.5\]](#) may issue exemption certificates with respect to exempt transactions. All persons or entities not required to register with the Department as retail merchants, manufacturers, or wholesalers, and who are exempt under this Act [\[IC 6-2.5\]](#) with respect to all or a portion of their purchases are authorized to issue exemption certificates with respect to exempt transaction provided an exemption number has been assigned by the Department of Revenue, or provided that the Department of Revenue has specifically provided a form and manner for issuing exemption certificates without the need for assigning an exemption number.

(b) Retail merchants are required to collect the sales and use tax on each sale which constitutes a retail transaction unless the merchant can establish that the item purchased will be used by the purchaser for an exempt purpose.

(c) All retail sales of tangible personal property for delivery in the state of Indiana shall be presumed to be subject to sales or use tax until the contrary is established. The burden of proof is on the buyer and also on the seller unless the seller receives an exemption certificate.

(d) Unless the seller receives a properly completed exemption certificate the merchant must prove that sales tax was collected and remitted to the state or that the purchaser actually used the item for an exempt purpose. It is, therefore, very important to the seller to obtain an exemption certificate in order to avoid the necessity for such proof. The mere filing of a Registered Retail Merchant Certificate number is not sufficient to relieve the seller of the responsibility to collect the sales tax or prove exempt use by the buyer.

(e) No exemption certificates are required for sales in interstate commerce, however, proper records must be maintained to substantiate such sales.

(f) An exemption certificate issued by a purchaser shall not be valid unless it is executed in the prescribed and approved form and unless all information requested on such form is completed.

(g) An exemption certificate or other evidence supporting an exempt sale must be maintained by the seller for at least three (3) years after the due date of the tax return upon which such exempt transaction is reported.

(h) Exemption certificates may be reproduced provided no change is made in the wording or content. (Emphasis added).

As provided by IC § 6-2.5-8-8(a), a seller accepting a valid exemption certificate has no duty to collect or remit the state gross retail or use tax on a purchase. Since Taxpayer has now provided the exemption certificates as part of the protest process, the Department will conduct a supplemental audit to verify any purchases by the customers listed on the exemption certificates. Any purchases by those customers will be removed from the list of taxable sales and the amount of sales tax due will be recalculated.

Regarding the imposition of use tax, Taxpayer states that several items were exempt. The first category which Taxpayer believes is exempt from use tax is diesel fuel used in off-road equipment. The equipment in question is a lawnmower which Taxpayer used to mow the grass at its place of business. Taxpayer does not reference any statute or regulation in support of the idea that diesel fuel used in a lawn mower is exempt. The closest regulation available addresses the agricultural exemption found at [45 IAC 2.2-5-4](#), which states in relevant part:

...

(c) The following is a partial list of items which are considered subject to the sales tax.

#### TAXABLE TRANSACTIONS

Fences, posts, gates, and fencing materials.

Water supply systems for personal use.

Drains.

Any motor vehicle which is required by the motor vehicle law to be licensed for highway use.

Ditchers and graders.

Paints and brushes.

Refrigerators, freezers, and other household appliances.

Garden and lawn equipment, parts, and supplies.

Electricity for lighting and other non-agricultural use.

Any materials used in the construction or repair of non-exempt: buildings, silos, grain bins, corn cribs,

barns, houses, and any other permanent structures.

Items of personal apparel, including footwear, gloves, etc., furnished primarily for the convenience of the workers if the workers are able to participate in the production process without it.

Pumps.

All saws.

All tools, including forks, shovels, hoes, welders, power tools, and hand tools.

Building materials or building hardware such as lumber, cement, nails, plywood, brick, paint.

Plumbing, electrical supplies, and accessories, pumps.

Horses, ponies, or donkeys not used as draft animals in the production of agricultural products.

Food for non-exempt horses, ponies, etc.

Fertilizer, pesticides, herbicides, or seeds to be used for gardens and lawns.

Field tile or culverts.

Graders, ditchers, front end loaders, or similar equipment (except equipment designed to haul animal waste). Any replacement parts or accessories for the above items.

(Emphasis added).

Therefore, lawn mowers and related supplies such as fuel are taxable. Taxpayer has not met the burden of proving the proposed assessment wrong.

Next, Taxpayer protests the imposition of use tax on items upon which it believes sales tax was paid at the time of purchase. Taxpayer states that, although it is unable to find any receipts or invoices in support of its protest, it seems unlikely and unreasonable for the Department to assume that tax was not paid. The Department notes that there were other items included as taxable in the audit report which Taxpayer agrees were subject to sales and use tax but did not have tax paid. Taxpayer has not met the burden of proving the proposed assessments wrong.

Finally, Taxpayer protests the imposition of use tax on items which it believes are facially for resale. Taxpayer also states that some items were originally purchased for resale but were commingled with other items purchased as supplied. Taxpayer believes that a one-third reduction of the part/supply purchases would be appropriate in this case. The Department is unable to agree with this proposition. As stated before, the proposed assessment is presumed to be correct until proven wrong. In this case, Taxpayer has only argued that the proposed assessment is wrong and has not proven so.

In conclusion, with regards to the exemption certificates supplied in the protest process, the Department will conduct a supplemental audit and will remove any sales to those customers for whom Taxpayer has supplied exemption certificates from the calculations of taxable sales. With regards to Taxpayer's use tax arguments, Taxpayer has not provided documentation to prove those proposed assessments wrong, as required by IC § 6-8.1-5-1(c).

#### **FINDING**

Taxpayer's protest is sustained in part and denied in part as provided above.

*Posted: 01/30/2013 by Legislative Services Agency*

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